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IN THE

Supreme Court of the United States

October Term, 1949

No. 486

ROBERTSON ROCK BIT COMPANY, INC., INDUSTRIAL MANUFACTURING & TOOL CO., and COLIN T. ROBERTSON,

Petitioners,

v.

HUGHES TOOL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Robertson Rock Bit Company, Inc., Industrial Manufacturing & Tool Co., and Colin T. Robertson respectfully pray for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that Court entered August 13, 1949, as amended September 27, 1949, affirming in part the judgment of the District Court of the United States for the Northern District of Texas (Judge ATWELL).

A transcript of the record of the case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Summary and Short Statement of the Subject Matter Involved.

1. The Court below, Judge SIBLEY dissenting "strongly" in part, affirmed a judgment of the District Court for the Northern District of Texas (Judge ATWELL), (1) holding four Hughes Tool patents for drilling bits valid and infringed by the petitioners (defendants in the District Court), and (2) also holding the petitioners guilty of converting Hughes bits. An injunction against infringing and against converting was granted.

2. Later the Court entered an amendment to its judgment, reversing the District Court as to one of the four patents, on the ground that it had expired during the appeal (Vol. I, R. 351).

3. Hughes Tool Company for 40 years has enjoyed a virtual monopoly in rotary drilling bits used in the drilling of oil wells. The basic patents held by it expired years ago, but the monopoly has been perpetuated by means of repatenting old subject matter and by means of pretenses of "leasing".

4. The Court below held that the pretended "leasing" arrangement, practiced by Hughes Tool Company to prevent repair of the cutting teeth on the bits and to force the purchase of unwanted new bits, was "practical, reasonable and completely fair".

5. The proof, however, showed convincingly that all the characteristics of a sale were present, and that the "lease" was no more than a shadow.

6. As for converting Hughes bits, the judgment of the Trial Court was utterly unwarranted, since there was no finding of fact bearing on conversion, no evidence of conversion, and as to the Robertson Company no charge of conversion in the complaint. Despite these fatal defects the Court of Appeals affirmed that part of the judgment.

Statement of Jurisdiction.

This Court has jurisdiction to review the judgment under 28 U. S. C. 1254 and 2101(c).

The judgment below was entered August 13, 1949 (Vol. I, R. 340), petition for rehearing denied September 22, 1949 (Vol. I, R. 349), and the judgment amended in an order entered September 27, 1949 (Vol. I, R. 349).

The Questions Presented.

The questions presented for review by this Court if the present petition is granted are:

1. Is it a defense to a suit for patent infringement that the owner of patents covering a combination of elements sells the patented device, receives the full purchase price, and later prevents purchasers from repairing one element of the patented combination by calling the sale a "lease", and also by claiming that repair constitutes infringement of the patents?

2. Are the three unexpired patents in suit valid, in view of the prior art?

3. May defendants be adjudged guilty of conversion where no finding of fact bearing on conversion was made by the Trial Court?

Reasons Relied on for Allowance of the Writ.

1. The decision below, on the issue of misuse and abuse of patents, is in conflict with applicable decisions of this Court.

2. The three unexpired patents in suit are void for want of invention. The decision below, in sustaining them, extends Hughes Tool's monopoly of drilling bits under patents that did not advance the art and that rely on subject matter identical with that of expired patents also owned by Hughes Tool.

3. On the issue of conversion, the Court below affirmed the judgment of the District Court, although there was no finding of fact that the petitioners had converted or threatened to convert. This was such a wide departure from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit, and that this Court review and correct the erroneous decision of that Court.

Respectfully submitted,

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DARBY & DARBY,
HARVEY W. MORTIMER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court (Judge ATWELL) is found at R. 297 and is reported at 80 F. Supp. 809.

The opinion of the Court of Appeals appears at Vol. I, R. 321; the amendment to the judgment, modifying the opinion, at Vol. I, R. 349; and the opinion is reported at 176 F. (2d) 783.

Statement of Jurisdiction.

This Court has jurisdiction to review the judgment below under the provisions of 28 U. S. C. 1254 and 2101(c).

Judgment below was entered August 13, 1949 (Vol. I, R. 340), petition for rehearing denied September 22, 1949 (Vol. I, R. 349), and the judgment amended in an order entered September 27, 1949 (Vol. I, R. 349).

Statement of the Case.

Hughes Tool Company manufactures 70% of the rotary bits used for drilling oil wells (R. 107). In 1947 it made and "leased" more than 290,000 bits (R. 164). It has over 200 men engaged exclusively in "superintending"—policing—its leasing system (R. 299).

The petitioners, Industrial Manufacturing & Tool Company and Robertson Rock Bit Company, are small companies organized by petitioner Robertson. During 1947 and 1948 they manufactured and sold about 450 bits. Robertson is also an independent drilling contractor (R. 165).

Hughes Tool Company sued the three petitioners for infringement of four patents for combinations in rotary bits used in drilling oil wells:

Fletcher	No. 1,856,627, issued May 3, 1932 (Vol. II, R. 321)
Scott & Garfield	No. 1,983,316, issued December 4, 1934 (Vol. II, R. 324)
Scott	No. 2,011,084, issued August 13, 1935 (Vol. II, R. 327)
Garfield & Scott	No. 2,030,442, issued February 11, 1936 (Vol. II, R. 330)

In a second count of the complaint (R. 5-6) Hughes Tool charged Industrial and Robertson with conversion. It did not charge the Robertson Company with conversion.

In the District Court Judge ATWELL held the four patents valid and infringed. His opinion (R. 297-300) is silent as to conversion, and he made no separate findings or conclusions; nevertheless, in the judgment he adjudged all three defendants guilty of conversion (R. 302).

At oral argument on the appeal the charge of infringement of the Fletcher patent was withdrawn (R. 336, Vol. I). That patent had expired while the appeal was pending.

The Court of Appeals, Judge SIBLEY "strongly" dissenting in part (R. 336, Vol. I), affirmed the District Court on the three unexpired patents (R. 340, Vol. I); but judgment was entered affirming on every point, including the expired patent (R. 340, Vol. I). A petition for rehearing was denied (Vol. I, R. 349). Later the Court entered an amend-

ment to its judgment, reversing the District Court as to the expired patent and ordering the complaint dismissed as to it (R. 349, Vol. I).

The Patents in Suit.

The three unexpired patents are on combinations in rotary drilling bits for use in drilling oil wells.

Scott & Garfield 1,983,316 (R. 324, Vol. II) represents repatenting of a three-cone bit with interfitting teeth, thus seeking to extend for nearly 11 years the monopoly Hughes Tool had enforced under claims 3 and 4 of Scott 1,480,014 (R. 575). (*Williams Iron Works* v. *Hughes Tool Co.*, 109 F. (2d) 500, 502, C. C. A. 10, 1940.)

The second patent held to be valid, Scott 2,011,084, is for a combination introducing rolling bearings into a drilling bit. The third, Garfield & Scott 2,030,442, is for a combination of bearing elements, precisely as shown in the first patent, Scott & Garfield 1,983,316. Judge SIBLEY in his dissenting opinion was of the view that there was no invention in these two patents. As to the last one, Garfield & Scott 2,030,442, it seemed "preposterous" to Judge SIBLEY to accord validity to it (R. 340, Vol. I).

Misuse of Patents.

After bits have been used in the field and the cutting teeth worn, it is practical for the driller to have them retipped by welding new metal tips on the cutting teeth and to make use of the retipped bits down to depths of 2,000 feet (R. 168-9, 172).

To put a stop to this practice Hughes Tool (which had admittedly sold bits until 1934) purported to "lease" them thereafter. The prices were not changed (R. 151-152).

The "lease" was evidenced by *very fine print* at the bottom of a "delivery report", reading (R. 477):

> "Hughes Roller Rock Bits and all Core Bit Heads are never sold but are leased. When the original cutter teeth and/or bearing have served their useful life, the user will surrender the bits to Hughes Tool Company upon request. In accepting delivery, the user agrees not to surrender any of the tools as mentioned above to other than a duly authorized representative of the Hughes Tool Company."

In practice, Hughes Tool sells the bits on purchase orders from local retailers (R. 162) and collects the purchase price. The local retailers in turn sell them to drillers, who pay the price in full to the retailers (R. 107). In other words, there is a sale by Hughes Tool to a retailer, followed by a sale by the retailer to the driller who uses the bit.

Under color of its "lease" and patents, Hughes Tool has used sequestration suits, infringement suits, and threats, to stamp out the retipping of bits and to force the return to it of good and useable bits, to be scrapped.

The Court of Appeals held, however, that the "leasing" method was "practical, reasonable and completely fair". It said that reclaimed bits were sent back to the Hughes laboratory, to be examined for possible defects. Hughes Tool acknowledged, however, in answer to an interrogatory, that relatively few used bits are ever sent to the laboratory (R. 152). The great majority are sold by Hughes Tool for scrap.

Specification of Errors.

The errors which petitioners will urge if the petition is granted are that the Court of Appeals for the Fifth Circuit erred:

1. In holding that Hughes Tool has not misused its patents.

2. In holding the three unexpired patents valid.

3. In holding the petitioners guilty of conversion.

Summary of Argument.

The argument will follow the reasons relied on for the allowance of the writ, as stated on page 4 hereof and in the index.

POINT I.

The decision below as to misuse and abuse of patents is in conflict with applicable decisions of this Court.

The proof shows an industrial featherbedding operation on the part of Hughes Tool by use of its patents and by pretended leasing of its patented devices. These measures have been resorted to so as to prevent the repair of good and useable bits in the field and to force their return to the owner of the patents to be sold for scrap (R. 189-192; PX4-10, R. 488-526; Interrogatories 80-81, R. 161, R. 115, 170). Customers must then "lease" new bits. As Hughes Tool controls the market on 70 percent of all new bits (R. 107), its interest in causing used bits to be scrapped rather than repaired is obvious.

Hughes Tool forces the return to it of every bit that has been put into the ground, in order to prevent the driller from sharpening the teeth by welding new tips on them, the way all heavy tools are sharpened (R. 181-182).

Down to 2,000 feet a retipped bit will serve as well as a new one (R. 169).

The means used by Hughes Tool are patent infringement suits, sequestration (replevin) suits, and agreements not to retip bits. The sequestration suits are brought under color of the "lease". However, the proof is conclusive that Hughes Tool sells its bits, in the same way that an automobile manufacturer sells automobiles, and does not lease them.

Hughes Tool's Bits Are Sold and Not Leased.

The Court below held that the lease was "practical, reasonable and completely fair". We submit, however, that in reality Hughes Tool sells its bits and does not lease them. The "lease" is a mere form, evidenced only by a clause in almost unreadable print at the bottom of Hughes Tool delivery reports (R. 477).

Hughes Tool appoints "supply houses" as its dealers. It does not make an agreement with these supply houses, save that in some cases a letter is written such as that printed at R. 162, which is "typical" (R. 162). The letter tells the dealer that Hughes Tool is "ready to honor your *purchase orders* for all tools of our manufacture on a dealer basis". Hughes Tool sells its bits to these supply houses and receives the full purchase price from them (R. 107).

The supply houses, which are mere retailers, sell the bits to drilling contractors and receive the full purchase price from them, payable in one lump sum (R. 107, 171).

Invoices from a supply house to drilling contractors are in evidence (R. 475-483). They are a printed form, and they bear the legend *"Sold To"*, and include a rigid sales contract (R. 476). (These invoices also show payment of a Wyoming sales tax.) When the supply house is paid by the drilling contractor, the transaction is complete. No more money is ever asked for or expected (R. 107, 171-172). Interrogatories 16, 17, 19, 20, 38, 72, 105 and 107 (R. 151-152, 161, 163, 171-172) are conclusive that the course of business covers a genuine sale. The "lease" is a bare pretense, fashioned to control the conduct of users of the bits, and the Court below should have so held.

> *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490.

The result below is, in principle, contrary to *United States* v. *Masonite Corporation*, 316 U. S. 265, where this Court penetrated an "agency" disguise and struck down restraints that exceeded the patent privilege. The Court said (pp. 277-278):

> "There are strict limitations on the power of the patentee to attach conditions to the use of the patented article. As Chief Justice Taney said in *Bloomer* v. *McQuewan*, 14 How. 539, 549, when the patented product 'passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.' And see *Adams* v. *Burke*, 17 Wall. 453; *Hobbie* v. *Jennison*, 149 U. S. 355. *In applying that rule, this Court has quite consistently refused to allow the form into which the parties chose to cast the transaction to govern.* The test has been whether or not there has been such a disposition of the article that it may fairly be said that the patentee has received his reward for the use of the article." (Emphasis ours.)

Sequestration Proceedings.

In the single County of Wichita, Texas, in the single year 1947, Hughes Tool sequestered (replevied) $9,850 worth of bits, by its own valuation, to be sold as scrap at 1.8 cents a pound, about 1/30th of their value at the time of sequestration (R. 189-192; PX4-10, R. 488-526; Interrogatories 80-81, R. 161; R. 115, 170).

These were bits that did not belong to it, but were taken in sequestration under color of the "lease", in order to prevent re-tipping and continued use by drillers.

Patent Infringement Suits.

Hughes Tool has used its patents for a combination of elements to prevent repair of one element of the patented combination. That the patents in suit are for a combination of elements was admitted in answer to Interrogatory 5 (R. 151). Each of these patents, as well as earlier patents now expired, has been used to support infringement suits brought by Hughes Tool against retippers (welders or blacksmiths who sharpen worn teeth by adding unpatented metal to the tips of the teeth). The following reported cases are indicative of the extent of this practice:

Southwestern Tool Co., et al. v. *Hughes Tool Co.*, 98 F. (2d) 42 (C. C. A. 10, 1938);

Hughes Tool Co. v. *United Machine Co.*, 35 F. Supp. 879 (D. C. Tex., 1939);

Hughes Tool Co. v. *Owen, et al.*, 39 F. Supp. 656 (D. C. Texas, 1941); reversed in 123 F. (2d) 950 (C. C. A. 5, 1941);

Hughes Tool Co. v. *Williams*, 82 F. Supp. 408 (D. C. Okla., 1949).

The situation comes to this, that for many years Hughes Tool has been successful in the lower courts in preventing repair of one element of a patented combination, on the alleged ground that such repair is equivalent to infringement of its patents.

Nevertheless it has been the law for 100 years that repair or replacement of one element of a patented combination does not infringe the patent.

Wilson v. *Simpson*, 9 How. 109.

Agreements.

Agreements not to retip bits, exacted by Hughes Tool and brought about by suits and threats of suits for patent infringement and sequestration, appear at R. 154, 159 and 527.

Spengler agreed, on being sued for patent infringement, not to make bits in 12 named states so long as Hughes Tool "carried on a like business in said states" (R. 157, 159).

Conagan, on being sued in replevin (R. 195), was asked to agree (R. 527) not to retip any Hughes Tool bit so long as six listed patents "remain in full force and effect, or so long as any Hughes Tool Company rock bits shall remain the personal property of Hughes Tool Company".

Owen, on being sued for patent infringement, simply agreed not to retip (R. 154).

Bingham was threatened with suit for patent infringement unless he agreed not to retip (DX2, R. 484; 186).

The use of patents and of pretended leases of the patented tool, in a drive to prevent legitimate repair, is, we submit, a manifest misuse of patents. We submit further

that it is the kind of misuse that should deprive the patentee of the aid of a court of equity to restrain infringement, within the principles expounded in *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, and *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495.

POINT II.

The patents in suit are invalid. The decision below extends Hughes Tool's forty year monopoly of rotary drilling bits under patents which have not advanced the art and which rely for patentability on subject matter identical with expired Hughes patents.

The situation as to drilling bits for use in drilling oil wells, presented in this case, is a fairly familiar one in our industrial life. A company which holds basic patents and has built up an extensive business on them sees the time approaching when its patents will expire, when the field will be opened to competitive enterprise. It seeks to project its monopoly into the distant future by taking out new patents on trivial changes or on exhausted combinations—and so to overawe the trade and suppress competition by suits for infringement of the new patents.

In his dissenting opinion Judge SIBLEY said (176 F. (2d) 783, at page 792; Vol. I, R. 336):

> "The present Hughes Tool Company, and its predecessors of the same name, have for about forty years enjoyed a virtual monopoly in the west in the manufacture and sale of rotary bits for drilling oil and gas wells, maintained by a series of patents, obtained or bought, on such equipment. Most of the patents have expired and only the last four were involved in this suit."

We submit with confidence that the patents in suit have not advanced the art. Indeed, they represent a retrogres-

sion if Hughes Tool's earlier patents, now expired or not in this suit, had the virtues claimed for them, for which they were given credit in previous suits brought by Hughes Tool. (*Reed, et al.* v. *Hughes Tool Co.*, 282 Fed. 807, C. C. A. 5, 1922; *Reed Roller Bit Co.* v. *Hughes Tool Co.*, 12 F. (2d) 207, C. C. A. 5, 1926; *Hughes Tool Company* v. *International Supply Co.*, 47 F. (2d) 490, C. C. A. 10, 1931; *Hughes Tool Company* v. *Garber Tool Co., et al.*, 16 U. S. P. Q. 97, D. C. Okla., 1932; *Southwestern Tool Co., et al.* v. *Hughes Tool Co.*, 98 F. (2d) 42, C. C. A. 10, 1938; *Chicago Pneumatic Tool Company* v. *Hughes Tool Company*, 97 F. (2d) 945, C. C. A. 10, 1938; *Hughes Tool Co.* v. *United Machine Co.*, 35 Fed. Supp. 879, D. C. Texas, 1939; *Williams Iron Works* v. *Hughes Tool Co.*, 109 F. (2d) 500, C. C. A. 10, 1940; *Hughes Tool Company* v. *Owen, et al.*, 123 F. (2d) 950, C. C. A. 5, 1941, reversing the District Court; *Hughes Tool Co.* v. *Williams*, 82 F. Supp. 408, D. C. Okla., 1949.)

In the cases just cited, the following Hughes patents have been held valid (none has ever been held invalid):

Hughes	930,759, issued in 1909
Godbold, et al.	1,320,384, issued in 1919
Scott	1,480,014 (R. 575), issued in 1924
Scott, et al.	1,647,753 (R. 578), issued in 1927
Fletcher	1,856,627 (Vol. II, R. 321), issued in 1932
Wellensiek, et al.	1,905,079, issued in 1933
Garfield	1,983,283, issued in 1934
Scott, et al.	1,983,316 (Vol. II, R. 324), issued in 1934
Scott	2,011,084 (Vol. II, R. 327), issued in 1935
Garfield, et al.	2,030,442 (Vol. II, R. 330), issued in 1936

despite the fact that in the *Chicago Pneumatic* case the Court of Appeals remarked at 97 F. (2d) 948 that patent 1,647,753, issued in 1927, was "in a well known and crowded art".

We submit that the patents in suits represent re-patenting of old ideas.

Scott & Garfield 1,983,316 is for a three-cone bit with interfitting teeth. It was shown by the defendants that the expired patent to Scott 1,480,014 (also owned by Hughes Tool), disclosing a two-cone bit with interfitting teeth, stated that "two or more" cutters may be used (R. 576, line 83); and the expired Scott patent had been held by the Tenth Circuit (*Williams Iron Works* v. *Hughes Tool Co.*, 109 F. (2d) 500, 502) to disclose, to claim in claims 3 and 4 (R. 577), and to be infringed by a three-cone bit with interfitting teeth.

The next patent, Scott 2,011,084 (R. 328, Vol. II), says at page 1, column 1, line 30, that ball bearings have been previously used in bits, without particular success, and explains at page 2, column 1, beginning at line 11 (R. 329, Vol. II) that he is going to use small balls, as distinguished from the prior art use of large balls. Hughes Tool's earlier patent to Fletcher, et al. 1,918,902 (R. 610) discloses at page 1, line 55, that small balls were old, but that this patent is for large balls. The importance of large balls is stressed at page 2, beginning at line 124 (R. 612) and page 3, line 27 (R. 613). Thus, the use of small balls being admittedly old, Hughes Tool first patented the use of large balls in 1,918,902, and later patented the use of small balls in 2,011,084.

As for the third patent, Garfield & Scott 2,030,442, we submit that Judge SIBLEY was right when he wrote (R. 340, Vol. I):

> "It seems preposterous to me to extend the monopoly of Hughes for several more years on this un-

patentable combination. As to this patent I strongly dissent."

There is strong policy, this Court has indicated, in protecting the public against exploitation of invalid patents.

> "It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly * * * ".
>
> *Pope* v. *Gormully*, 144 U. S. 224.

POINT III.

In affirming the judgment of the District Court on the issue of conversion in the absence of a finding of fact that the petitioners had converted, the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

It was palpable error to affirm that part of the judgment of the District Court which adjudged the petitioners guilty of conversion.

There Was No Finding of Fact That the Petitioners Had Converted.

The District Judge made no findings of fact or conclusions of law. His opinion, extremely brief and fragmentary (R. 297-300), was no substitute. No mention of conversion can be found in it. This was not an oversight; the truth is that there was not a shred of evidence in the case to support the charge of conversion, and the Robertson Company was not even charged with conversion in the complaint (R. 5-6).

Nevertheless, the judgment entered by the District Judge adjudged and decreed that "the defendants have converted and threaten to convert rock bits of the plaintiff" (R. 302). And that part of the judgment, barren as it is of support by findings of fact, was affirmed in the Court of Appeals for the Fifth Circuit.

The Violation of Rule 52(a) of the Rules of Civil Procedure is Manifest.

Rule 52(a) provides:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment * * *. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

This Court has laid stress on the necessity of compliance with this rule on the part of the District Court, and has not hesitated to reverse and remand for failure to follow it.

Interstate Circuit v. *United States,* 304 U. S. 55;

Mayo v. *Lakeland Highland Canning Co.,* 309 U. S. 310.

The departure from the accepted, usual and required course of judicial proceedings is too plain to call for extended discussion.

Conclusion.

Petitioners pray that the petition for writ of certiorari be granted, the case be reviewed and the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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New York, N. Y.,
December 15, 1949.